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ABSTRACT

In response to a request by the Presidential Task Force on Regulatory Relief, this report offers specific recommendations for reform of federal regulations. A cover letter explains the constraints imposed by the recommended format: that the report is unable to address adequately the area of federal regulatory activity generating the most adverse criticism from college and university counsel--i.e., the present mode of enforcement of the laws, Executive Orders, and regulations pertaining to prohibited discrimination. The issues are not presented in priority order. The regulations addressed include: executive order for affirmative action in federal contracts: prohibition of sex discrimination in employment, and equity in pay: Section 504 of the Rehabilitation Act of 1973: sexual harrassment in employment: debarment and suspension of eligibility for financial assistance: three federal student financial aid programs (National Direct Student Loans, College Work-Study, and Supplemental Educational Opportunity Grants): the Family Educational Rights and Privacy Act of 1974 (privacy of student records): administrative procedures for reporting on all federal student assistance programs: Title IX of the Education Amendments of 1972 (sex discrimination, especially in athletics and employment): and Veterans Administration programs affecting colleges and universities (especially reporting requirements, course eligibility, aid payments, the 85-15 attendance rule, and overpayments). For each regulation covered, these elements are included in the report format: agency source of the rule, specific citation, description of problems, estimated cost, other possible impact, proposed solution, and name and address of originator. (MSE)

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NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

REPORT
OF THE
TASK FORCE ON DE-REGULATION INITIATIVES

SUBMITTED TO THE
PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF
MAY 1, 1981

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The Honorable George H. W. Bush
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Dear Mr. Vice President:

Attached is a report compiled by this Association's Task Force on De-Regulation Initiatives in response to your request for specific recommendations for reform of Federal regulations. The membership of this Task Force includes legal counsel for more than sixty institutions of higher education and all members have been drawn from this Association's membership of 2,200 attorneys. The comments transmitted today, while certainly not exhaustive of our problems with Federal regulations, do reflect the primary concerns of college and university counsel and arise from experiences with the proliferation of regulations impacting higher education. Due to the differing perspectives of Task Force members, however, the issues addressed have not been placed in order of priority.

Because of the constraints imposed by the suggested format, these comments cannot adequately address the area of Federal regulatory activity which generates the most adverse criticism from college and university counsel, namely, the present mode of enforcement of the laws, Executive Orders, and regulations pertaining to prohibited discrimination. It must be emphasized at the outset that while advocating a complete overhaul of present enforcement mechanisms, the higher education legal establishment intends no retreat from the goals of equal opportunity and affirmative action to which our respective institutions remain firmly committed. Our quarrel is over procedure, not substance. It is a fact, however, that the present conditions of redundancy of law, overlapping of agency responsibility and jurisdiction, and imposition of an onerous paperwork burden, have wrought confusion, inefficiency and gross wastefulness to the Federal civil rights enforcement effort.

The present laws and regulations dealing with discrimination were developed in a haphazard and often ad hoc way and now form a crazy patchwork which sustains a bloated bureaucratic establishment in the various departments of the Executive Branch. The experience of the past decade has shown that more laws, more regulations, and more bureaucracy do not accelerate progress towards a more just society. It seems clear that an efficient, competent, less costly and more efficacious enforcement effort cannot be achieved by piecemeal efforts at reform. It is, therefore, respectfully suggested that the present chaotic conditions of the Federal anti-discrimination enforcement effort warrant the formation of a special Presidential commission to design a coordinated and cohesive approach to the problems of non-discrimination and equal opportunity. The work of such a Presidential commission should be directed to the production of an omnibus bill to simplify the present web of laws and regulations and to streamline the Federal agencies which are simultaneously active in this area.

The Association greatly appreciates the opportunity afforded college and university attorneys to voice their most serious concerns to your Task Force. We would be pleased to respond to requests for further and more specific information.

Thank you for your consideration of this report.

Very truly yours,

Estelle A. Fishbein

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NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS
TASK FORCE ON DE-REGULATION INITIATIVES

SOURCE OF RULE: Department of Labor, Office of Federal Contract Compliance Programs (OFCCP)

CITATION: 41 CFR Part 60-2.1 et seq.; 41 CFR Part 60-60; Technical Guidance Memo No. 1 (TGM No. 1)

DESCRIPTION OF PROBLEMS: This regulation implements Executive Order 11246 (30 FR 12319) as amended, requiring Federal contractors to take affirmative action to insure that employment practices operate without regard to race, color, religion, sex or national origin. The regulations require each contractor to develop an affirmative action program committing itself to "rectifying" any "deficiency" of minorities and women in its workforce by specific hiring "goals" and "timetables" relating to these groups. Underutilization is defined in 42 CFR 60-2.11(b) as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." However, TGM No. 1 significantly changes that definition by an "interpretation" stating that "underutilization exists whenever there is a numerical disparity between the availability of minorities or women for a job group and the number of such persons employed in the job group." Firestone Synthetic Rubber & Latex Co. v. Marshall, 49 U.S.L.W. 2535 (2/24/81), struck down TGM No. 1, holding that it is unreasonable, inconsistent with the regulation it interprets and with past agency practice, and that it was promulgated in violation of the Administrative Procedure Act. OFCCP has not indicated that it will recall TGM No. 1 and has appealed the decision of the United States District Court for the Eastern District of Texas.

An employer who does not develop an affirmative action program satisfactory to OFCCP because of deficiencies in the overwhelming paperwork required, or meet established goals is in jeopardy of contract debarment even though no act of discrimination has occurred. This mechanical and inflexible approach to affirmative action not only diverts resources and institutional attention from a substantive analysis of its employment policies, it also relies upon arbitrary and invalid statistical assumptions and calculations. The extraordinary amounts of records and data required to be specially developed and preserved are useless, unduly expensive and unnecessary to verify affirmative action and non-discrimination. The problem is exacerbated by the subjective and vacillating demands of OFCCP in judging compliance with the regulation, e.g., by requiring an employer to use meaningless "availability" percentages, irrelevant labor markets, and contrived job groupings which do not reflect an institution's organizational structure. There is a paucity of data on the minority and female representation in many academic disciplines and subspecialties within each of the disciplines. In many subspecialities the availability of minorities is virtually nonexistent. Accordingly, page after page of the required availability and utilization analyses which universities are required to produce carry lines of zeroes indicating the non-availability of minorities and women for academic jobs.

ESTIMATED COST: There presently exist no estimates for higher education as a whole. They will be forwarded when available. Costs for individual institutions can be estimated if desired.

OTHER IMPACT: The regulation does not distinguish between industry and higher education. The nature of the academic workforce is unlike that of industry; each faculty member is unique in terms of skills. In the mechanical determination of "availability" and "utilization," however, the regulation proceeds upon the industrial experience of the identity of skills and the fungibility of individuals within broad job groupings. It also proceeds upon the premise that individuals minimally qualified are "qualified" for the purpose of estimating their "availability" in the industrial labor force. Higher education, however, to preserve excellence in teaching and research, traditionally has sought to hire the most qualified into a faculty or research position. By ignoring these historic distinctions, the regulations distort and jeopardize affirmative action in educational institutions.

Further, unlike the industrial sector, advancement and reward for excellence in higher education, i.e., promotion and award of tenure, rest upon the evaluation of one's academic peers. To remain uninhibited and free from intimidation, this evaluation system requires confidentiality. In connection with compliance reviews, however, OFCCP has demanded that institutions breach this tradition of confidentiality by disclosing the names, opinions and personally identifiable votes of those serving on promotion and tenure committees. Once revealed to OFCCP there is no effective way to protect this information from further public disclosure. This places the integrity of the academic evaluation process in jeopardy since persons are reluctant to serve on promotion and tenure committees or to commit to writing any negative opinions.

PROPOSED SOLUTION: The present regulation must be repealed and replaced with broad guidelines aimed at requiring federal contractors to review their hiring and employment practices and policies to insure they are non-discriminatory. Employment practices should be evaluated on substantive criteria rather than according to inflexible numerical guidelines. TGM No. 1 should be nullified. OFCCP should be prohibited from intruding into the confidentiality of promotional and tenure evaluations by requiring access to personally identifiable votes and opinions.

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NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS
TASK FORCE ON DE-REGULATION INITIATIVES

SOURCE OF RULE: Equal Employment Opportunity Commission
Department of Labor

CITATION: 45 Fed. Reg. 86249 (Dec. 30, 1980)
29 CFR §800.116(d), 41 CFR Part 60-20.3(c)

DESCRIPTION OF PROBLEMS: In prohibiting sex discrimination in employment and in mandating equal pay for members of both sexes, Congress did not itself address the question of use of actuarially valid, sex-segregated mortality tables in retirement or life insurance programs to which employers and employees make contributions. In a holding that was expressly confined to the facts of that case, the Supreme Court in City of Los Angeles, Department of Water and Power v. Manhart, 98 S.Ct. 1370 (1978), ruled that a retirement plan set up by a public body, which was not an insured plan and required female employees to make greater monthly contributions in order to receive the same monthly benefits as paid to men, violated Title VII. The defined contribution (money purchase) retirement plans such as those typified by TIAA-CREF, a private insurer and the pension carrier for the majority of colleges and universities, are totally different from the plan involved in Manhart. A woman with the same amount of accumulated funds as a similarly situated male will receive smaller periodic benefits under a TIAA-CREF plan because of her greater life expectancy. Regulations promulgated by the Wage and Hour Administration in DOL (29 C.F.R. §800.116(d)) provide that there is no violation of the Equal Pay Act if a plan provides either for equal employer contributions or equal monthly benefits. OFCCP regulations currently in force are to the same effect. [41 CFR Part 60-20.3(c)] However, proposed OFCCP regulations announced on December 30, 1980 would modify that agency's position and bring it into conflict with that of the Wage and Hour Administration by accepting as nondiscriminatory only those plans producing equal benefits. (45 Fed. Reg. 86249) Despite promulgation of earlier DOL policy, EEOC has expanded upon Manhart and taken the position that regardless of equal contributions for both sexes by employers and employees, plans such as TIAA-CREF constitute illegal sex discrimination. EEOC has taken the further position that unisex tables must be effectuated retroactively both with regard to past service of future retirees and former retirees, and that institutions must provide additional pension contributions so that the monthly payments to males are not reduced but monthly payments to women are brought up to the level of males both prospectively and retroactively. EEOC's policy was never the subject of a regulation promulgated pursuant to the Administrative Procedure Act. EEOC has initiated three of nine pending cases against colleges and universities, has filed suit against the Superintendent of Insurance for the State of New York, where the use of unisex tables has been banned, and has threatened to file redundant charges against each of the 3,400 colleges and universities participating in TIAA-CREF.

ESTIMATED COST: If an employer is required to "top up" retired women's benefits for all women retiring as of a certain date, e.g., 1/1/82, to the level of benefits received by males, then each employer's additional cost

would be: approximately 10% of the current female's accumulations (thus raising questions about whether the current employer is required to "to up" benefits earned by prior ervice with other employers) plus approximately an additional 10% per year of the total premiums being remitted for female employees each year.

PROPOSED SOLUTION: Currently two Federal agencies, DOL and EEOC, have conflicting policies with regard to permissible types of pension and retirement plans which employers may offer, and even two agencies within DOL have exhibited inconsistent positions. In effect, EEOC has adopted a far-reaching policy without benefit of a promulgated regulation and without opening the decision-making process to public comment pursuant to the Administrative Procedure Act. A statutory or regulatory solution must be imposed on the chaotic situation created by EEOC. The obvious inflationary impact and manifest inequity of the imposition of huge retroactive liability on colleges and universities where there still is no uniform Federal agency policy as to the governing legal requirement in this matter, must be remedied. There should be a clear enunciation of legislative or regulatory rule with prospective application only.

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SOURCE OF RULE: Department of Education, Office for Civil Rights (OCR)

CITATION: 45 CFR 84 et seq.

DESCRIPTION OF PROBLEMS: This regulation implements Section 504 of the Rehabilitation Act of 1973, 29 USC 794.

Section 504 is a short statute of general intent which merely prohibits discrimination on the basis of handicap in "any program receiving Federal financial assistance." The regulation expands its applicability to "each program or activity that receives or benefits from such assistance." The regulation requires complete program accessibility, including structural modification to existing facilities and future "barrier-free" construction. The regulation, however, is not self-executing and does not supply funds necessary to implement its requirements. The financial burden of compliance is magnified because the regulation prohibits the grouping of handicapped individuals in certain facilities and programs, thus foreclosing to institutions an opportunity to reduce compliance costs. Compliance with the regulation has been and shall continue to be extraordinarily expensive both in absolute terms and in consideration of the small number of beneficiaries.

The costs of compliance are considerably increased by 45 CFR §84.44(d)(1) apparently requiring institutions to provide, without charge, auxiliary aids (such as sign language interpreters, taped texts, library readers) for each handicapped student as required by the nature of a student's disability even where the costs to the institution exceed the tuition paid! The continuing expense of providing auxiliary assistance jeopardizes the existence of many small programs, especially self-supporting activities. (The question of whether this regulation requires institutions to provide free auxiliary aids and, if so, whether the regulation constitutes an unauthorized extension of the non-discrimination obligation of the statute is presently before the Supreme Court. University of Texas v. Camenisch, 616 F. 2d. 127 5 Cir. 1980), Cert. granted (No. 80-317, 1980 term), argued Mar. 31, 1981, 49 U.S.L.W. 3740.)

The requirement that an institution modify its academic requirements for particular handicapped students unless they can demonstrate such requirements to be "essential to the program of instruction . . . or to any directly related licensing requirement" (§84.44) represents an unjustifiable intrusion into internal academic judgments. The extent of programatic adjustment necessary to allow participation of disabled individuals has become a major issue, since the Office for Civil Rights is requiring substantial alteration of academic degree requirements.

§84.42 prohibits denial of admission on the basis of handicap and prohibits pre-admission inquiries regarding handicap. Yet there are situations where the public interest is not served by such an inflexible rule. For example, this section would prohibit a medical, dental or nursing school from denying admission to an individual handicapped by reason of a drug or alcohol addiction even though the nature of the handicap is a strong indication that the person cannot safely be charged with the responsibility for the health

care of others, and even though working in a health care environment would give the drug addict additional opportunity to obtain a variety of drugs illicitly at clear risk to his own well-being. Moreover, as drug addiction and alcoholism are grounds in most States for revocation of a medical or dental license, it is unreasonable to insist that such persons have a right to enter these professional schools. The outright prohibition against pre-admission inquiries also prevents medical schools from inquiring into past mental illnesses of applicants although sound mental health and mental stability is vital to successful completion of the stressful medical school curriculum. Indeed, the statistics showing the high rate of suicide amongst medical students are in themselves sufficient justificaiton for pre-admission inquiry regarding history of mental illness.

The regulation also prohibits discrimination by recipients against qualified handicapped individuals in employment. Restrictions on pre-employment inquiry regarding disabilities, however, have limited the ability of institutions to protect themselves against costs associated with otherwise avoidable job injuries and disability/sickness leave and pay.

Moreover, there is an important conflict between the 504 regulations and the regulations of the Drug Enforcement Administration (DEA) which must be addressed. An opinion of former Attorney General Griffin B. Bell stated that drug addicts and alcoholics are to be considered "handicapped" for purposes of the Rehabilitation Act of 1973. A great many universities and university medical centers keep narcotics, amphetamines and barbiturates in large quantities for use in patient care and laboratory research, and DEA requires the screening of employees to assess the likelihood of an employee committing a drug security breach (21 CFR §1301.90). Recipients of Federal financial assistance are prohibited by 45 CFR §84.14 from making pre-employment inquiries as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. Thus a university violates 45 CFR §84.14 if an applicant being considered for a job involving access to addictive drugs is asked whether he is or has been addicted although such inquires are contemplated by 21 CFR §1301.90. Clearly the public interest is served by permitting universities and other employers to screen out addicts so that they are not employed in situations giving them access to drugs.

ESTIMATED COST: Total costs are unavailable. Costs to date and estimated future costs for individual institutions of higher education are available. The inflationary impact statement accompanying publication of the proposed regulation was grossly understated.

PROPOSED SOLUTIONS:

a) The regulation should be repealed to the extent that it requires architectural modifications/requirements and free auxiliary aids, without accompanying funds being provided by the federal government.

b) Prohibitions against the grouping of handicapped individuals with similar disabilities in order to reduce operational costs should be repealed.

c) The regulation should be repealed to the extent it attempts to regulate programs of a recipient institution, including employment and self-support activities, which do not directly receive funds.

d) The definition of "qualified handicapped" person should be amended to emphasize "qualified despite the handicap." Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979).

e) 45 CFR §84.14 should be amended to permit pre-employment inquiries and phisical examinations in order that drug addicts and drug users may be screened out of the applicant pool where the position to be filled involves access to drugs.

f) 45 CFR §84.42(b)(4) should be amended to permit pre-admission inquiries by professional schools to determine the existence of conditions bearing on the fitness of the applicant to pursue the course of professional study and practice of the profession.

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NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS
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SOURCE OF RULE: Equal Employment Opportunity Commission

CITATION: 29. CFR §1604.11 [*Note: Office of Federal Contract Compliance Programs (DOL) published virtually identical regulations. 45 Fed. Reg. 86216, 86226 (Dec. 30, 1980).]

DESCRIPTION OF PROBLEMS: This regulation defines and prohibits as a violation of Title VII of the Civil Rights Act of 1964 (42 USC §2000e et seq.) "sexual harassment" in employment. The definition of "sexual harassment" includes such vague and subjective terms as "unwelcome sexual advances" and "verbal sexual conduct," and necessarily relies greatly on personal perception, thus diminishing its usefulness as a guide to defining prohibited behavior. The regulation's vague language, particularly in light of prevailing standards of social behavior, invites frivolous and self-serving complaints. The phrase "unwelcome sexual advances" is particularly puzzling since it carries the inference that "welcome sexual advances" are an acceptable form of behavior in the work place. Actually all aggressive sexual behavior should be deemed to be inappropriate and unacceptable conduct in the work place regardless of the receptivity of the object of such conduct to "sexual advances," whatever that might be. The severe consequences both to an accused employee and to the employer of a charge of sexual harassment warrants the further refinement of the definition.

§1604.11(e) makes employers vicariously responsible for acts of non-employees. There is no legal basis for imposing vicarious liability on an employer for the acts of persons other than the employer's officers, agents and employees. While this section is unfair to all employers, it places a college or university employer in particular and unfair jeopardy due to the presence in the academic community of large numbers of students. Students, by reason of their youth and immaturity, may indulge in patterns of behavior which, while acceptable to their peers, may be unacceptable to institutional employees. Student misconduct, no matter at whom it is directed, is traditionally handled as part of the educational process through informal intervention by educational authorities and formal student disciplinary codes and procedures. Student misconduct is quite enough of a problem to educational authorities, and the addition of the threat of Title VII liability is wholly unjustified and serves no useful purpose.

§1604.11(e) is also objectionable because it fails to give notice as to what the Commission will consider to be "appropriate corrective action." The "Supplementary Information" preceding the actual regulation at the time of its publication in the Federal Register, while noting this difficulty, merely responds inadequately to this concern by stating, "What is considered to be 'appropriate' will be seen in the context of specific cases through Commission decisions." It should be noted that colleges and universities typically maintain internal grievance and disciplinary procedures for faculty and non-faculty employees. Because the regulation makes "sexual harassment" a violation of Title VII for which employers are vicariously liable, it provides

a disincentive for employers to refer complaints to internal bodies for resolution since a finding that a complaint is valid might subsequently be used against the employer in a Title VII sex discrimination action. Moreover, a finding against the complainant would not preclude the bringing of a Title VII suit.

OTHER IMPACT: Diminishing frivolous complaints would be beneficial to EEOC and would free its personnel for other Title VII matters.

PROPOSED SOLUTION:

I. The definition of "sexual harassment" should be amended as follows:

> "Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Sexual favors may not be required either explicitly or implicitly as a term or condition of an individual's employment. The submission to or rejection of sexual favors may not be used as the basis for employment decisions. Sexual conduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment is prohibited."

II. Potential for abuse of the regulation prohibiting "sexual harassment" would be considerably diminished and de minimis complaints would be reduced if the regulation incorporated the elements of an analogous tort, intentional infliction of emotional distress. [See RESTATEMENT (SECOND) OF TORTS, §46 (1965).] It is suggested that the regulation be amended so that in order to constitute a violation of Title VII, the following elements must be present:

A. The sexual conduct must be intentional or reckless;

B. The sexual conduct must be extreme and outrageous;

C. There must be a causal connection between the wrongful sexual conduct and the terms, conditions or decisions affecting the complainant's employment.

D. Where emotional distress is alleged, it must be severe.

III. In addition, §1604.11(e) imposing vicarious liability on employers for the acts of non-employees should be repealed.

IV. The use of the term "appropriate corrective action" in §1604.11(d) (which also appears in §1604.11(e)) should be defined in order that employers may be apprised of the standard of conduct expected of them. In the absence of any elucidation of that term, employers will be subjected to the highly personal attitudes of EEOC enforcement personnel. In any event, the use by an employer of standing grievance and disciplinary mechanisms should be deemed to be "appropriate corrective action" regardless of the outcome.

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SOURCE OF RULE: Department of Health and Human Services

CITATION: "Debarment and Suspension from Eligibility for Financial Assistance" 45 Fed. Reg. 67262, October 9, 1980 (*Note: There is no specific statutory authority for the regulation.)

DESCRIPTION OF THE PROBLEM: These newly minted regulations incorporate vague and subjective standards for debarment from financial assistance. Particularly offensive in the new regulation is the provision that debarment decisions "shall be made within the discretion of the Secretary and shall be rendered solely in the best interest of the Government" and the provision permitting an indefinite period of "temporary suspension" of a recipient's or applicant's eligibility for grants without a hearing pending debarment proceedings. Furthermore, there has been no demonstration of necessity for such a regulation since the Department already has the discretion to refuse a grant to an applicant whose previous performance had demonstrated unreliability, unsatisfactory performance, violation of law or terms and conditions of a grant, and conviction of or an indictment for a crime. These have long been valid considerations in any award of government contracts and grants.

OTHER IMPACT: The regulation provides an opportunity for the corrupt use of bureaucratic power. By threatening to impose a "temporary suspension" of a recipient's eligibility for grants, an institution can be pressured to succumb to improper demands of agency personnel and can be "dissuaded" from opposing unlawful or excessive demands of the bureaucracy. As a general principle, regulations which are not rooted in statutory authority, which are of probable illegality, and which depart from accepted constitutional standards of substantive and procedural due process ought not to be left in force to vex the citizenry.

PROPOSED SOLUTION: Repeal of the regulation

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SOURCE OF RULE: Office of Management and Budget

CITATION: "Cost Principles for Educational Institutions"
OMB Circular A-21

DESCRIPTION OF PROBLEM: The new record keeping requirements mandate that faculty and researchers on federal grants and contracts account for the manner in which they apportion 100% of their time to the categories of research, teaching, service and administration, even where parts of their salaries are met from non-federal sources and part of their workload is unrelated to the federally sponsored work. The requirements generate vastly more paperwork than previous time and effort reports and result in meaningless reports because in the University setting, teaching, research, service and administration overlap and it is impossible to neatly separate them. Moreover, to require individuals to report to the government how they spend that portion of their time which is not supported by government funds is unnecessarily intrusive into the privacy of those persons and is deemed highly offensive by faculty.

ESTIMATED COST: National cost is not available. However, as an example, at Stanford University the new regulation would require an increase from 3,000 to 80,000 reports annually, and cost between $250,000 to $300,000 to put in operation.

ESTIMATED BENEFIT: National figures unavailable but appreciable labor savings will be realized by each institution receiving grants and contracts.

OTHER IMPACT: The new reports impose an enormous paperwork burden which is unjustified because they are impractical and will not result in greater accountability. At The Johns Hopkins University, for example, it has been shown that the new system will require 15 file cabinets to accommodate the new workload distribution reports generated whereas only one file cabinet was required to hold the previously required reports for an equivalent period of time. Moreover, the vast amount of trivia required by the new reports will make it more difficult for auditors to uncover fraud, mismanagement and waste.

PROPOSED SOLUTION:

ALTERNATIVE 1: Accountability can best be achieved by shifting away from the cost reimbursement method of research support and substitution of a fixed obligation grant which would delegate responsibility for management of the awarded funds from the government to the recipient institution in the same manner that the recipient handles its own funds. The government could judge whether it is getting its money's worth by placing the focus on accountability on the technical progress made, rather than on the allocatoin and allowance of costs. Government audits could be concerned with evaluating the adequacy of the institution's financial and administrative systems to ensure that proper and adequate controls are in place to avoid fraud and waste.

ALTERNATIVE 2: Repeal of OMB Circular A-21 and reinstatement of former salary documentation requirements pending development of refined methods of accountability.

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NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS
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SOURCE OF RULE: Department of Education

CITATION: Title IV of the Higher Education Act of 1965, as amended, 20 USC §1070 et seq. Particular regulations:

National Direct Student Loans	34 CFR §674
College Work-Study	34 CFR §675
Supplemental Educational Opportunity Grants	34 CFR §676

DESCRIPTION OF PROBLEMS: The regulations for the three programs enumerated above share several common provisions, the problems with which are described below.

1. Sections 674.14, 675.14 and 676.14, "Coordination of student financial aid programs, award amount and overaward," impose more requirements in the coordination of the total awards made in a given year than does the Act. Specifically, §443(b)(4) of Title IV of the Higher Education Act was amended by the Education Amendments of 1980 to eliminate the requirement that a student terminate his or her job under the College Work-Study Program in the middle of the term and to allow earnings to be subsidized by federal funds until earnings less the work-study award exeed $200. The regulations, however, penalize a student when the earnings exceed the work-study award by $200 by reducing awards of other Title IV funds. In addition to abrogating the intent of the amendments to the Act in these regulations, this coordination requires increased monitoring by the institution and disrupts staffing requirements.

   In general, the concepts of need and overaward are artificial and arbitrary. Need is based upon the taxation law concept of adjusted gross income. That figure allows for shielding of much earned income, thus demonstrating its lack of value as an indicator of need. The artificial system of assigning a need/overaward value invites and contributes to excessive paperwork and disruption of staffing arrangements when determinations of need and overaward would be more equitably left to the judgment of financial aid professionals.

2. Sections 674.16, "Making and disbursing loans," 675.16, "Payment To Students" and 676.16, "Payment of Grant," require in advance of any payment or disbursement a signed statement that the funds will be used for an educational purpose. This statement serves no useful purpose and creates an unjustifiable paperwork burden.

3. Sections 674.19, 675.19, 676.19, "Fiscal procedures and records, pose several problems.

a. Section 675.19(b)(2)(B) requires a statement on the work-study timesheet that the work was performed satisfactorily. At some institutions time is kept on cards with no notation for assessment of performance, and a second, duplicative timesheet is required to meet this requirement. This creates an unjustifiable paperwork burden. The determination of quality of work and the method for dealing with unacceptable performance is properly an internal matter.

b. Sections 674.19(c)(2)(i) and 675.19(b)(2)(viii) require monthly reconciliation of NDSL and work study records. The process is extremely costly, and especially so because of the frequency with which it must be performed. This represents an unjustifiable paperwork burden.

c. Sections 674.19(q), 675.19(e) and 676.19(e) require annual, outside audits to be paid for by the institution. These are extremely costly, especially on an annual basis.

ESTIMATED BENEFIT: Considerable reduction in paperwork burden. Greater efficiency of institutional personnel resulting in reduced labor cost in staffing student financial aid offices.

PROPOSED SOLUTIONS:

1. The regulations requiring coordination of the programs, 34 CFR §§674.14, 675.14 and 676.14 should be reviewed and amended to comply with the intent and requirements of Title IV of the Higher Education Act of 1965.

   Financial aid professionals should be allowed to exercise more judgment in the determination of need and overaward. If a dollar figure is necessary, a range could be established within which the administrator could take into account the particular factors in a given case.

2. The statement for educational purpose required by 34 CFR §§674.16, 675.16 and 676.16 should be eliminated, or at the very least, worked into the initial applications for the programs.

3. The requirement that a work-study student's timesheet indicate that his work was performed satisfactorily, 34 CFR §675,19(b)(2)(B), should be eliminated.

4. The monthly reconciliation of NDSL and work-study records, 34 CFR §§674.19(c)(2)(i) and 675.19 (b)(2)(viii), should be an annual requirement.

5. The requirement for annual non-federal audits, 34 CFR §§674.19(q), 675.19(e) and 676.19(e), should be changed to be required only every two to three years, and only for that particular year.

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SOURCE OF RULE: Department of Education

CITATION: Family Educational Rights and Privacy Act of 1974, 20 USC 1232g, 45 CFR 99.T et seq.

DESCRIPTION OF PROBLEMS: This statute and its implementing regulation replace local policies of American schools and colleges concerning the confidentiality of their student records. The legislative history of this Act indicates that no information was ever adduced to the effect that academic institutions of higher education were deficient in keeping student records sufficiently confidential. No cognizance had been given to the fact that most colleges and universities had policies and procedures in place which preserved confidentiality of student records yet disclosed to the student information he had a legitimate need to know. Institutional policies on this subject, although they might differ in minor respects, were the result of institutional experience, academic judgments, and common sense. Indeed, for some years prior to the passage of FERPA, there existed a Guide to the Release of Information About Students. The Guide had been developed by the American Association of Collegiate Registrars and Admissions Officers, a professional organization active since 1910 that counseled institutions of higher education to formulate policies regarding both the information that becomes part of a student's permanent educational record and the conditions of its disclosure. The Guide's introduction advised that, "This policy should reflect a reasonable balance between the obligation of the institution for the growth and welfare of the student and its responsibilities to society." Higher education's quarrel with the Buckley Amendment and the accompanying regulation is that evidently no consideration was given to striking a reasonable balance between these interests and responsibilities. The Act and regulation unnecessarily intrudes into an area best left to internal academic control where there had been no demonstrable problem of appreciable dimensions. Federal intrusion has harmed those who were to be the beneficiaries of the new legislation, namely, students. Faculty now are noticeably reluctant and often refuse to furnish letters of recommendation unless a student waives his right of inspection. Letters of recommendation typically bear indicia of inhibited and trite statements, and are given little weight by admissions officers and employers.

FERPA is costly to implement and cumbersome to administer. It replaces local initiative, and final interpretation on any issue rests with the Department of Education.

ESTIMATED BENEFIT: Reduction in paperwork. Would eliminate Federal intrusion into matters of internal institutional policy.

OTHER IMPACT: Impedes ability of educational authorities to contact or inform parents of adverse circumstances affecting their children when, in their judgment, parental involvement is warranted.

POTENTIAL SOLUTIONS:

a. Repeal of Act, or;

b. Revisions to the Act and regulations, as follows:

1. Repeal right of inspection of letters of recommendation; a student right of inspection obviously inhibits the writer's willingness to give honest albeit negative evaluations.

2. Broaden information defined as "directory information" and require that such information remain public. An institution should be able to reveal basic information about its enrolled students and former students, such as their names. It serves the public interest for educational institutions to be able to verify attendance and degrees earned.

3. Permit responsible administrators more freedom to exercise judgment in the release of information to third parties.

4. Limit institutional recordkeeping requirements and their attendant costs.

5. Abolish appeals to the Department of Education; there is no evidence that institutions have acted improperly or unfairly in their own required hearing procedures.

6. Permit law enforcement subpoenas without a duty to attempt to notify the student in advance; the present rule slows law enforcement efforts.

7. Abolish sanction of loss of funds. Cutting off research programs and student scholarship funds are not appropriate responses to an improper release of a student record;

8. Exclude short course and workshop records from the provisions of the Act;

9. Permit more liberal release of awards, honors, prizes and records of extraordinary achievement.

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SOURCE OF RULE: Department of Education

CITATION: Title IV of the Higher Education Act of 1965, as amended, 20 USC §§1070 et seq., 34 CFR §§668, 674-76, 682-83, 690.

DESCRIPTION OF PROBLEMS: In 34 CFR §668 are found regulations that apply to all federal student financial assistance programs. The following are particularly burdensome problems found in those regulations:

1. Section 668.12, "Audit exceptions and procedures," requires an institution to repay funds improperly spent, including overawards and awards made when files are incomplete. This procedure could cost an institution thousands of dollars for minor infractions, such as missing forms.

2. Section 668.14, "Financial aid transcript," requires an institution into which a student is transferring to obtain from his or her previous institutions a financial aid transcript before the student can receive funds from the new institution. Particularly, the transcript must be requested when the student has received a Pell grant for the current award year or has ever received a supplemental grant or National Direct Student Loan (NDSL). The purpose is to monitor the cumulative student loans awarded or the yearly Pell or supplemental grants awarded. This requirement is standard, regardless of whether the aid for which the student is currently applying impacts on either cumulative or yearly totals. For example, a student may previously have received only an NDSL and be subject to a cumulative total. However, he may now be seeking only a Pell grant, which would not impact on cumulative loan totals. Yet, the new institution could not make payment on the Pell grant, with a minor exception, until it had received the financial aid transcript that would show only the cumulative loan amounts. That information would be totally irrelevant to the award of a Pell grant. At one large, urban University, this requirement results in 4000 unnecessary requests for transcripts each year.

3. Section 668.16, "Standards of administrative capability," sets forth criteria on which an institution will be judged to be capable of administering the aid programs. One of the criteria is that the institution compare all financial aid documents, needs analysis documents, statements of educational purpose, eligibility documents, income tax returns and citizenship documents to verify consistency. In a large institution this is administratively impossible.

4. Section 668, subsection F, spells out procedures whereby an institution's eligibility to participate in the federal student assistance programs may be suspended, limited or terminated for substantial misrepresentation of its educational program, the cost of attendance, or the employability of its graduates. The statutory authorization for this procedure is found at 20 USC §1094. While no

one would argue that an institution that engages in substantial misrepresentation of its program should be rewarded with continued receipt of federal aid, this provision goes far beyond the purpose of Title IV by regulating all institutions and the contents of their catalogs. Moreover, notwithstanding that the stated penalty for misrepresentation is a suspension or termination of eligibility, it suggests the basis for a federal private cause of action against an institution for misrepresentation.

ESTIMATED BENEFIT: Significant reduction in paperwork burden with appreciable savings in costs of administering student financial assistance programs.

PROPOSED SOLUTIONS: (with reference to the problems as enumerated)

1. A suggested approach would be to establish an error rate based on a percentage of an institution's allocated funds. This would protect an institution from minor errors, and yet allow for recovery from institutions with excessive errors.

2. A suggested approach is to require a transcript before award of an NDSL but not for Pell or Supplemental grants unless the student is transferring in the middle of an award year.

3. It is suggested that this requirement be met by utilizing a sampling system, such as is used currently to review Pell grant contractors.

4. Inasmuch as institutions are required to provide consumer information to students, and misrepresentation would be a violation of the institution's requirement to provide that information, there is already a mechanism in place for controlling the relatively few cases of misrepresentation. The statute and implementing regulation should be repealed.

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SOURCE OF RULE: Department of Education

CITATION: Title IX of the Education Amendments of 1972; 45 CFR 86.37(c); 45 CFR 86.41; 44 Fed. Reg. 71413.

DESCRIPTION OF PROBLEMS: The present Department of Education interpretation of Title IX is most troublesome in two areas: athletics and employment.

Revenue-producing sports perform a palpably unique function in intercollegiate athletics. Directly through ticket sales, and indirectly through contributions of fans, these sports produce income which is key to the entire athletic program. Under the Department's interpretation, these sports are treated the same as non-revenue sports in the calculation of equivalent opportunities. Yet the budgets of these sports are necessarily large for reasons manifestly unrelated to sex discrimination. Their size is a reflection of their mass entertainment and revenue function. Their inclusion in equivalency calculations ensures budget difficulties in men's non-revenue programs at many schools, since those sports would have to be curtailed to meet the Department's equivalency formulas to the detriment of the entire school population. A number of schools have already begun phasing out teams. The revenue and fund raising aspects of revenue sports must be recognized and accorded appropriate weight.

A word must be said about the Department's "Policy Interpretation." This document proposes certain models and standards and is replete with practical difficulties. For example:

1. Intercollegiate athletics do not always fit the Policy Interpretation formulas. "Interest and ability" can be and often are created by recruitment. In that sense a formula based on "accommodation of student interests" has no meaning.

2. Scholarship distribution on the basis of per capita participation does not take into consideration practices and traditions such as large squads in some sports, nor the needs of revenue sports.

3. Definitions of key phrases such as "levels of competition," "equivalence in athletic benefits and opportunities" and "student interests and abilities" are not helpful. These are vague and subjective concepts; yet they are basic to any finding of non-compliance.

The other area of special note is the Department's insistence from time to time on including employment issues under Title IX. Their insistence on regulating coaches' and tutors' salaries is a typical example. The great weight of judicial authority is that employment is not an area covered or contemplated by Title IX. Junior College District v. Califano, 597 F.2d. 119 (8th Cir. 1979), Romeo Community Schools v. United States Department of Health, Education and Welfare, et al., 600 F.2d. 581 (6th Cir. 1979), Islesboro School Committee v. Califano, 593 F.2d. 424 (1st Cir. 1979), and Seattle University v. United States Department of Health,

Education and Welfare, 49 U.S.L.W. 2029 (9th Cir. 1980). Moreover, sex discrimination in employment is already prohibited by Title VII so coverage under Title IX is redundant.

PROPOSED SOLUTIONS:

a) Revision of the OCR Title IX implementing regulation 45 CFR 86 to specifically exclude revenue sports in the calculation of equivalent benefits for student athletes, including financial assistance. Alternatively, reinterpretation of the regulation and the April 18, 1978, opinion of the General Counsel, HEW, to accomplish exclusion.

b) Affirmation by the Department of Education that Title IX regulations do not cover employment.

c) Repeal or substantial revision of OCR's Title IX Intercollegiate Athletics Policy Interpretation (44 Fed. Reg. 71413).

d) Limit the effect of Title IX to programs directly receiving Federal funds.

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SOURCE OF RULE: Veterans Administration

CITATIONS: 38 CFR §§21.1 - 21.5500 (promulgating 72 Stat. 1114, 1171, as amended; 38 U.S.C. §210, 1501-1511, unless otherwise noted)

DESCRIPTION OF PROBLEMS: The Veterans Administration regulations have, through the years, caused enormous concern and confusion throughout the higher education community. In particular, the following issues have been recurring ones:

1. The regulations impose frivolous, enormously difficult and costly reporting burdens on institutions. Administrative burdens placed on colleges and universities extend to certification of the number of hours veteran-students attend classes, reporting of course composition, and numerous record-keeping requirements.

2. Institutions may be held secondarily liable if a veteran retains loan funds in contravention of the regulations.

3. The Veterans Administration is authorized under the regulations to determine whether or not particular courses are eligible for approval as items in the course-load of a VA loan-assisted veteran.

4. The "85-15" law and regulations still provide no avenue for waivers for institutions where student bodies are veteran-concentrated. Administrative burdens and record keeping requirements under the "85-15" section also must be changed.

5. Sections of the regulations are in apparent conflict with the Family Educational Rights and Privacy Act. These sections should be changed or clarified.

6. Under the present regulatory scheme, the reporting of changes in enrollment is a twofold responsibility involving the student and the institution. The institution bears the heavy responsibility of making reports of changes in enrollment even where the student fails to inform the VA and the institution of a change. The institution is responsible for submitting information regarding 1) changes in hours of credit or enrollment, 2) unsatisfactory progress or conduct and/or 3) interruption and termination of attendance of each veteran, serviceperson or eligible person. These events must be reported (and received by the VA) no later than 30 days after the occurrence. These are costly and overbearing record-keeping requirements.

PROPOSED SOLUTION: See attached pages for each regulation.

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SOURCE OF RULE: Veterans Administration

CITATION: 38 CFR §21.4151(b)

DESCRIPTION OF PROBLEMS: This regulation provides that the State approving agency designated by the VA, rather than the academic institution, is responsible for determining those courses which may be approved for the enrollment of veterans and eligible persons. The state approving agency is also responsible for ascertaining whether a school at all times complies with its established standards relating to a course or courses which have been approved. The regulation is unnecessarily intrusive into internal academic affairs since its effect is to remove from the academic institution itself authority to certify courses for enrollment of veterans. This procedure is costly both for institutions and for the VA. First institutions must submit to the approving authorities catalogs, course descriptions and other information and must keep track of which courses are and are not veteran-approved. Then the VA and the State approving agency must duplicate the work of the institution in reviewing courses.

ESTIMATED BENEFIT: Reduction of paperwork burden on institution as well as on government agencies.

POTENTIAL SOLUTION: In re-drafting regulations, it should be made entirely clear that "satisfactory standards" are those established by academic institutions themselves. Course accrediting should be carried out by the institutions in accordance with their normal procedures, not by potentially arbitrary educational standards imposed by Federal Officials.

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SOURCE OF RULE: Veterans Administration

CITATIONS: 38 CFR § 21.1 Delegations of Authority
38 CPR § 21.2 Finality of Decisions
38 CFR § 21.3 Review of Decisions
38 CFR § 21.4001 Delegations of Authority
38 CFR § 21.4002 Finality of Decisions
38 CFR § 21.4003 Revision of Decisions
38 CFR § 21.4009(j) Finality of Decisions

DESCRIPTION OF PROBLEMS: The above-noted regulations delegate authority to the Chief Benefits Director and certain designated Veteran's Administration (VA) Personnel to make findings and decisions with regard to disputes under the vocational rehabilitation and educational benefits regulations. Despite the fact that the VA is now required to cite the statutory law in support of any rules, regulations guidelines or other published orders or interpretations of regulations, and despite recent court decisions, the above-stated regulations do not provide for outside judicial review of administrative determinations made by the Chief Benefits Director. Accordingly, since the decision is made by an official of the VA, and not an impartial hearing examiner or court, fair and impartial decisions may not be forthcoming.

Should an institution become involved in a dispute with the VA, the institution, which is usually a "third party" to the conflict (because it is the veteran and not the institution receiving direct benefits) must be offered a fair and impartial opportunity to be heard. Under the present regulations, this has not always been possible. First, hearings are normally conducted by a panel of three persons employed by the VA. These persons are employees who may be subject to pressure from their superior at the VA. Secondly, the decision in the matter is not generally made by the individuals who are hearing the case. Instead, a transcript of the hearing, which the deciding individuals may not have time to read, is delivered from the panel hearing the case to the decision-making body. Generally, no discovery may be had by the institution before the hearing. Without such information, it may be impossible for the institution to present a sufficient case.

Finally, the VA initiates proceedings with a presumption of liability which is unauthorized by the governing statutes. For example, an overpayment hearing opens with a request that the institution present its evidence but the VA is not required to produce any evidence. Thus, an institution may be in the position of not having notice of the specific facts upon which its alleged liability is based before the hearing (discovery being refused), and it is not informed of those facts at the hearing.

Since the VA hearing officers are not lawyers, it has been difficult or impossible for institutions to put forth legal arguments. This is of particular concern since the issues in a number of hearings, in particular overpayment hearings, involve interpretations of statutes.

POTENTIAL SOLUTION: Procedural problems such as those discussed above could be substantially avoided and perhaps eliminated by simply requiring the VA to conduct its business in accordance with the federal Administrative Procedure Act. Most other federal agencies are subject to the provisions of the Act. Though judicial decisions and proposed legislation have suggested this change, it has not been forthcoming.

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SOURCE OF RULE: Veterans Administration

CITATION: 38 CFR §§21.4130 et seq. PAYMENTS; EDUCATIONAL ASSISTANCE ALLOWANCE; in particular 21.4135(g) and 21.5130 Discontinuance Dates for Benefits; 21.4203(d) and 21.5200 Reports by Schools; 21.4253(d) 21.4254(b) and 21.5250 Approval of Programs; and 21.4277, 21.4278 and 21.5270 Discontinuance because of unsatisfactory progress.

DESCRIPTION OF PROBLEMS: This series of regulations bases payment to veterans of educational assistance benefits on certain attendance requirements and proof of continued enrollment. Proof of enrollment and attendance, including dates of commencement of courses and termination of courses, are required to be reported and certified by the institution, often within a 30 or 60 day time period. These reporting requirements create a tremedous burden for educational institutions which may be subjected to gathering statistics on veterans individually, without the proper time in which to even collect this information. In accordance with specifications of DVB Circular 22-80-38, Responsibilities of Schools, all schools are required to maintain extensive academic records showing certain information, as well as attendance records. A school's policy and regulations for standards of progress and conduct must define;

1. the school's grading system:,
2. the minimum satisfactory grade level;
3. conditions for interruptions of training due to unsatisfactory grades or progress:,
4. a description of any probationary period;
5. conditions for a student's reentrance or readmission; and,
6. conditions for dismissal due to unsatisfactory conduct.

School officials are responsible for enforcing and reporting their established standards of progress. This requires that the school specify intervals between enrollment and graduation (i.e., completion) when each student's progress will be evaluated. Each student evaluation must compare the student's progress with clearly defined progress standards such as minimum grade levels, credit levels, etc. Further, the circular requires that the "reporting official" assist the student and the VA by furnishing the reason(s) progress or conduct is considered unsatisfactory, and describing the apparent courses, if known.

The difficulties to academic institutions posed by the above-stated regulations and reporting requirements are obvious. First, the burden is on the institution to keep records of all kinds and to report information concerning veterans to the VA. The record keeping and reporting requirements are costly, duplicative, and sometimes impossible for institutions to properly comply with. For example, a catalog or bulletin of a school has been considered by the VA to be unsatisfactory if a statement of the institution's standards of progress was not included. Further, the regulations require and the circular points out that the reporting official must assist the VA by furnishing the "reasons" a particular veteran's progress is considered unsatisfactory at the

institution. Normally, academic institutions neither keep, catalog, nor report such information to any outside individual or agency. The circular also states, in support of the reporting requirements of the regulation, that the school's certifying official is "encouraged" to submit a statement with the first recertification of enrollment that describes the conditions for the student's continued certification to the VA. Similarly, no such particularized statement would normally be kept by an institution on its students.

POTENTIAL SOLUTIONS: If information is required to be furnished by schools, the regulations should catalog, and the VA should accept, information as it is kept and recorded by the institutions for their own purposes. This way, reporting could be accomplished from institution records without the need of obtaining additional information for the VA. For example, instead of a statement of the reasons for a student's continued certification to the VA or a justification of re-enrollment, the student's reinstatement letter could be forwarded directly to the VA by the student himself. This would lessen the cost to institutions and the record-keeping and reporting burdens placed upon them.

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SOURCE OF RULE: Veterans Administration

CITATION: 38 CFR §21.4201; DVB Circular 20-76-84 - Appendix H

DESCRIPTION OF PROBLEMS: Though waivers are now allowed for institutions which certify that 35 percent or less of their total student populations receive VA educational assistance, institutions which have larger veteran populations are still subject to the "85-15" regulation.

The "85-15" law (38 U.S.C. §1673) provides that no new enrollment or re-enrollment in any program be approved for an eligible veteran for any period during which more than 85 percent of the students enrolled are having all or part of their tuition fees, or other charges, paid to or for them by the educational institution or the Veterans Administration.

There appears to be no reason to retain the absolute prohibition against any waiver for courses of study in which the enrollment of VA-supported students exceeds 85 percent. There are neither educational nor legal grounds for assuming circumstances change or course quality declines when the enrollment of veterans exceeds 85 percent.

POTENTIAL SOLUTIONS: Any institution in which the percentage of veteran students exceeds 85% should nevertheless be permitted to apply for a waiver and make its case for the quality of the program in question. The refusal to permit application for waiver is arbitrary, irrational, insulting to veteran students, and raises the question of a violation of substantive due process.

Finally, the requirement that counts of numbers of VA-supported students be completed within 30 days after the end of each calendar quarter is administratively unrealistic for institutions offering programs leading to a standard college degree. The end or beginning of a term is not related to changes in enrollment by course of studies; students may change majors at any time. Studies indicate that students often switch their major fields. Enrollment changes, adds, drops and withdrawals may not be solidified even after 45-60 days from the beginning of the term. Furthermore, the 30 day periods at the beginning or end of terms are the times of heaviest administrative workload on any campus, and nonessential tasks should be performed at other times. Therefore, in institutions where it is found to be required, the certification of 85-15 compliance should not be due to be submitted for at least 60 days.

The requirement that schools maintain the records and computations showing 85-15 compliance for three years should be amended to one year. It is unreasonable to maintain such records for a longer period, unless the VA notifies the institution that it will undergo compliance reviews for prior years.

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NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS
TASK FORCE ON DE-REGULATION INITIATIVES

SOURCE OF RULE: Veterans Administration

CITATION: 38 CFR §21.4009 Overpayments; Waiver or Recovery

DESCRIPTION OF PROBLEMS: The above-noted regulation concerning overpayments makes an educational institution liable for an overpayment made to a veteran or eligible person if it is determined by the VA that the overpayment was made as a result of 1) wilfull or negligent failure of the school to report excessive absences from a course, or discontinuance or interruption of a course by a veteran or eligible person, or 2) false certification by the school.

This particular regulation focuses several of the problems for institutions found not only here but throughout the regulatory scheme. First, the reporting requirements on the institution are burdensome, overbearing and costly. Often, more detailed attendance records must be kept for veterans or the information must be gathered and reported in an unreasonably short period of time.

Secondly, it is extremely burdensome to place the institution, a third party and not the recipient of the benefits, in a situation of liability where benefits delivery is improper.

PROPOSED SOLUTION: This is a matter in which the Veterans Administration should be required to go directly to the student, and the student only, for overpayment reimbursement. If the school is potentially liable, standards for liability should be better-defined in the regulatory scheme. Finally, as has been stated, the hearing system as described by this section should be revamped in accordance with the federal Administrative Procedure Act. Under the present regulation, it is presumed that the institution is liable (which is outside the statutory authority under which the regulations were promulgated). Hearing officers are VA employees who are not lawyers. No discovery is allowed the institutions, and therefore, they are in a position of having to go to hearings with no information about the cases except notification from the VA. Since the institution is normally acting as a conduit to give the VA funds to the veteran, it should not be required to subject itself to monetary liability such as that prescribed in these sections.

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SOURCE OF RULE: Veterans Administration

CITATION: P.L. 96-466 (Regulations have not yet been promulgated)

DESCRIPTION OF PROBLEMS: The new Section 1784(b) of P.L. 96-466 requires educational institutions, before receiving reporting fees, to certify that they have exercised reasonable diligence in determining whether the institution, or any course offered by the institution and approved for the enrollment of veterans or eligible persons, is in compliance with the VA rules and regulations set forth in Chapters 34, 35, and 36 of Title 38, United States Code. Institutions must, under the new law, certify that they will, without delay, report any failure to meet the requirements. This is an onerous, duplicative and burdensome requirement.

PROPOSED SOLUTION: Repeal statute.

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